Denver Theatrical Stage Employees' Union No. 7 of the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada *and* Carole A. Miron. Case 27–CB–4028

June 6, 2003

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

On July 6, 2001, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed limited exceptions, a supporting brief, and an answering brief. The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and affirms the judge's rulings, findings,[1] and conclusions,[2] and adopts the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that Respondent, Denver Theatrical Stage Employees' Union No. 7 of the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Operating an exclusive hiring hall by making referrals without reference to objective criteria.

(b) Failing and refusing to refer Carole Miron, or any other stagehand, without reference to objective criteria.

(c) In any like or related manner restraining or coercing applicants for referral in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Operate its hiring hall by making referrals in accordance with objective criteria.

(b) Make Carole Miron whole for any loss of earnings suffered as a result of the unlawful actions against her, by paying her sums of money and other benefits, in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), including any pension plan credits, equal to that which she would have earned but for the Respondent's unlawful actions against her.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its hiring hall and office in Denver, Colorado, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members or applicants for referral are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have modified the judge's recommended Order to conform more closely to his conclusions, and clarified that the make-whole remedy for Carole Miron's loss of pay and benefits as a result of Respondent's unlawful actions against her is to conform with *F. W. Woolworth Co*., 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We have also modified the judge's recommended Order in accordance with *Ferguson Electric Co.*, 335 NLRB 142 (2001). Finally, we have substituted a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[3] We deny the General Counsel's request, in his limited cross-exceptions, that we order the Respondent to put newly promulgated, objective hiring hall criteria in writing.

Instead, we shall allow the Respondent an opportunity to establish referral criteria and standards that conform to the requirements of the Act, without, however, requiring that they also be in writing. See *Stage Employees IATSE Local 646* (*Parker Playhouse*), 270 NLRB 1425 (1984).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER ACOSTA, dissenting in part.

I write to dissent, only with respect to my colleagues' decision not to grant the General Counsel's request that we order the Respondent to promulgate and maintain written objective criteria for the operation of its exclusive hiring hall.

The nondiscriminatory operation of an exclusive hiring hall is critically important to applicants for work—they rely on this for their livelihood. Indeed, in the hiring hall context, "the union's distinct role as both employer and bargaining representative carries a special obligation to exercise power fairly."[1] As the Court of Appeals for the District of Columbia Circuit reminds us, "[t]he union's tremendous authority and the workers' utter dependence create a fiduciary duty on the part of the union not to conduct itself in an arbitrary, invidious, or discriminatory manner when representing those who seek to be referred out for employment by it." *Boilermakers Local 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988) (quoting in part *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898, 908 (1985)).

Today, we find that the Respondent's business representative who ran the hall did so based on "subjective determinations" as to the experience, skills, and abilities of applicants. The business representative classified applicants for work into a "core group" and a "noncore group," and referred core group workers first. Workers were not told in which class they were placed. Workers were not provided a procedure for disputing their placement in the noncore group. And, most notably, the Respondent classified prospective workers using no objective standards but rather through "mental filtering" by the Respondent's business representative. These actions, we find, violated the Respondent's duty of fair representation.

The General Counsel has requested that our remedy include an Order requiring the Respondent to promulgate and maintain written objective criteria. Although the absence of written standards is a factor to be considered when determining whether a hiring hall is operated objectively, I note that the absence is not itself an unfair labor practice. *Stage Employees IATSE Local 646 (Parker Playhouse)*, 270 NLRB 1425 (1984). Nevertheless, in the circumstances of this case, I agree with the General Counsel that requiring the Respondent, for a period of years, to establish and maintain written objective criteria for the operation of its hiring hall would be a reasonable exercise of the Board's remedial authority. See *Federated Department Stores*, 287 NLRB 951 (1987).

[1] *Jacoby v. NLRB*, 325 F.3d 301, 304 (D.C. Cir. 2003), citing *Jacoby v. NLRB*, 233 F.3d 611, 616 (D.C. Cir. 2000).

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT operate our exclusive hiring hall by making referrals without reference to objective criteria.

WE WILL NOT fail or refuse to refer Carole Miron or any other member or nonmember in accordance with our exclusive hiring hall agreements and arrangements with signatory employers.

WE WILL NOT, in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Carole Miron whole for any loss of earnings and other benefits she may have suffered as a result of our unlawful actions against her, plus interest.

WE WILL operate our exclusive hiring hall by making referrals in accordance with objective criteria.

DENVER THEATRICAL STAGE EMPLOYEES' UNION NO. 7 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA

Amadeo E. Ruibal, Esq. and *S. Kato Crews, Esq.*, for the General Counsel.

Thomas B. Buescher, Esq., for the Respondent.

DECISION[1]

ALBERT A. METZ, Administrative Law Judge. This case involves issues of whether the Respondent Union has violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act).[2] These issues center upon the Respondent's operation of its hiring hall, as well as certain actions it took regarding

[1] This case was heard at Denver, Colorado, on February 20–21, 2001.

[2] 29 U.S.C. § 158(b)(1)(A) and (2).

employee Carole Miron. On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the parties' briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent admits and I find, that Freeman Decorating Company (Freeman) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Respondent represents employees who work as stagehands in the Denver, Colorado area. These employees work at venues pursuant to collective-bargaining agreements that the Respondent has negotiated with various employers including Freeman.

Respondent's agent, Business Representative Jim Taylor, is responsible for referring employees to employment through the Respondent's hiring hall. As described by Taylor, an employee will telephone a designated number when he is available for work. The caller will record his name and a phone number where he can be reached. The Respondent's secretary, Marion Berry, listens to the calls on a daily basis and prepares a computerized list for Taylor's use in making referrals.

Taylor is informed of requests for employees by telephone calls and faxes from employers. The employers will request a designated number of employees and possibly designate the tasks or skills that are required for the job. Stagehand skills include show floor layout, setup/decorating of show booths, carpet laying, carpentry, electrical, lighting, video, audio, movie camera work, operation of forklifts and high lifts, special effects, construction/changing of sets/scenery, and overhead rigging. The stagehands' work is done at sites such as theaters, convention centers, hotel ballrooms, and arenas.

Employers rent show space for a short specific period. Tight scheduling requires that the move in, setup operation, and move out of a convention, etc., be done in a timely manner. The Respondent provides stagehands with Taylor's business card that emphasizes being on time is of paramount importance and instructing employees to call the Respondent if they cannot meet a referral obligation or are going to be late. Likewise, some of the Respondent's collective-bargaining agreements have provisions that stress stagehand timeliness.

The Respondent's stewards supervise the stagehands. Stewards are responsible for insuring the stagehands' work is done in a timely and professional manner. If stagehands are deficient in their work, stewards are expected to rectify the matter. They may also report vexatious problems to the Respondent.

III. REFERRAL AGREEMENTS AND PRACTICE

The Government alleges that the Respondent's operation of its hiring hall is done pursuant to exclusive agreements and practice and violates the Act because its referral of employees is done without reference to objective standards or criteria. The Respondent denies that it has maintained a practice, agreement and/or understanding with employers requiring that Respondent be the exclusive source of referrals of stagehand employees. The Respondent further denies that its referral criteria violate the Act.

A. "Exclusive" Issue

The Respondent currently has approximately 18 collective-bargaining agreements with employers in the Denver-Metropolitan area. Some of these agreements provide that the Respondent will be the exclusive source the employers will first look to for employees. Brede Decorating Company and the Freeman Decorating Company are large employers of stagehands in the Denver area. Together they use an estimated 50–60 percent of the stagehands working in the Denver area. Both of these employers have collective-bargaining agreements with the Respondent and those agreements provide that the Respondent shall be the exclusive agent for the referral of stagehands for employment.

The Respondent's agreement with the Colorado Symphony Association (CSA) provides that the employer "will give the Union first opportunity to furnish, and the Union agrees to furnish, applicants for employment with the requisite skills." That agreement also requires that should a stagehand be directly hired by the CSA the employee "must obtain a registered referral slip from the Union before going to work." The Respondent's agreement with a company called SMG provides that it will "provide competent, qualified and technically skilled Intermittent Stage Hands to the satisfaction of the Company." SMG regularly uses the Respondent as its source for hiring stagehands and has never rejected an employee referred to it by the Respondent. Similarly, Taylor testified that the City and County of Denver uses the Respondent as its sole source for hiring stagehands.

I find, based on the record as a whole, that the Respondent does operate an exclusive hiring hall with respect to some employers, such as Freeman and Brede, and that, with regard to certain other employers (such as SMG, CSA, and the city and county of Denver) have a practice of using the Respondent as the exclusive first source for hiring stagehands. *Plumbers Local 198 (Stone & Webster)*, 319 NLRB 609 (1995); *Laborers Local 889 (Anthony Ferrante & Sons)*, 251 NLRB 1579 (1980); *Graphic Communications Workers Local 245 (Alden Press)*, 196 NLRB 720 (1972).

B. Hiring Hall Referral Criteria

The Respondent represents approximately 30 employees who are members of Respondent and are regular, full-time employees of employers that are signatory to the collective-bargaining agreements. Approximately 200 other employees work out of the Respondent's hiring hall on a referral basis. The majority of these employees are union members, but the Respondent makes referrals regardless of union membership. There is no contention that employees are referred to jobs based upon their union membership or lack thereof.

Taylor testified that since about 1996 the employees using the hiring hall are divided into two groups for referral purposes—a core group and a noncore group. Taylor solely determines the distinction between the groups. He has selected approximately 120 individuals whom he considers are attempting

to make a full-time living as stagehands. This group he designates as his "core" group. The employees in the noncore group are individuals Taylor believes are only seeking part-time stagehand employment. Core group employees are referred to work before noncore employees are sent out. The Respondent maintains no written standards as to how an individual is selected to be in the core referral group. Employees are not told in which group they are placed and there is no procedure for disputing such placement. Employees using the hiring hall are notified that they should telephone the hall to report their availability for work. Taylor testified that he assumes that core group employees are always available for referral and thus he does not require that they notify the Respondent of their availability in order to have priority in receiving referrals. Those employees that Taylor considers noncore are required to telephone the Respondent to state their availability for referral. If noncore employees do not so notify the Respondent they are not referred for work.

Taylor testified that he takes into consideration the following factors when determining whom he is placing in the core group: (1) the frequency the employee telephones indicating his availability for work; (2) whether the employee answers his phone when called with a referral; (3) whether the employee regularly accepts job referrals; (4) the employee's skills; (5) other employment the employee may have; (6) whether the employee meets the expectations of the employer; and (7) is the employee timely in reporting for work.

As previously noted, the Respondent's secretary, Marion Berry, checks for calls twice a day and prepares a call-in list based on her check. The list is given to Taylor on a daily basis and he uses it in making referrals. Taylor does not leave messages when telephoning employees with job referrals. If a registrant is not available to take his call he will telephone another employee.

Taylor testified that he expects noncore employees to call the referral line on the day they are available for work. Taylor refers core employees to work first and then uses the current week call-in list to refer noncore employees. Should the current week be depleted of names, Taylor will then refer to prior lists for additional referral prospects. Calls or faxes requesting employees with specific skill necessitate Taylor assigning personnel he knows possess those abilities. Some employers make "name" calls requesting certain employees and Taylor attempts to honor such requests.

IV. MULTIEMPLOYER PENSION TRUST

The Respondent's collective-bargaining agreements contain requirements for a multiemployer pension fund. The pension plan is funded by the signatory employers and administered by two representatives from the Respondent and two from signatory employers. Taylor and Respondent's president, Richard Schadle, are fund union trustees.

All Stagehands working for signatory employers may participate in the pension plan, but they must first establish their eligibility. An employee must work 3 years for signatory employers and work a minimum of 1000 hours in a calendar year beginning with the first job to which the employee is referred. Qualification years do not have to be worked consecutively in order to qualify for the pension. The pension credit an employee receives is determined by the amount he is paid during a given year by signatory employers. The employee must submit his W-2 forms to the Respondent each year so the pension credit can be calculated. The Respondent annually sends a letter to employees reminding them of the need to submit their W-2 forms.

Marion Berry collects the employees' W-2 forms. She uses the forms to calculate the total wages earned by an employee. Berry is responsible for maintaining the employees' files containing their pension information, including retaining the W-2 forms in these files. She also routinely prepares correspondence relating to pension eligibility matters and sends this to employees over Taylor's signature.

The Respondent's answer denied that Berry is its agent. I find that the record as a whole demonstrates that the Respondent has assigned Berry the functions of maintaining the out-of-work call-in list, as well as, receiving, calculating, and maintaining files pertaining to employees' pension eligibility documents. I, thus find, that Berry is the Respondent's agent for such purposes within the meaning of Section 2(13) of the Act. *Plumbers Local 198 (Stone & Webster),* 319 NLRB at 612.

V. CAROLE MIRON

Carole Miron has worked as a stagehand using the Respondent's hiring hall since 1993. Miron has never been a member of Respondent's labor organization. In approximately 1997 she applied for membership but the members rejected her application. Between 1993 and the end of 1998, Taylor referred Miron for stagehand work 3 to 5 days a week. Taylor testified that regardless of Miron's referral record he did not consider her to be a core group employee.

Miron testified that she turned her W-2 forms into the Respondent each year so that she would become qualified for a union pension. Miron recalled that she would deliver the forms to the Respondent's offices. On March 23, 1999, the Respondent sent Miron a letter wherein Taylor thanked her for applying to participate in the pension plan. Taylor's letter stated: "Currently you are in your 1st year. When you reach the 3rd year you will be eligible. You must make at least $20,000 every year to be eligible." Miron telephoned Berry shortly after receiving his letter. She protested that she did not consider herself to only be in the first year of pension eligibility and noted that she had been submitting her W-2 forms as required. Berry told Miron that she should send the Respondent her old W-2 forms.

Between 10 and 10:30 p.m. on April 24, 1999, Taylor telephoned Miron and referred her to a job to do move-out work for the show, *Les Miserables.* The move-out was to commence at 11:30 p.m. and continue into the early morning hours of April 25. Miron testified that, despite the short notice, she arrived for work about 10 minutes early and the show was still in progress. Miron was required to sign a list when she arrived. Several other employees were lined up to sign in when she arrived. Miron signed the list and wrote in a an arrival time of 11:30 p.m. Miron testified that she worked on the show move-out and then telephoned the hiring hall referral number and stated she was available for a new assignment.

Miron testified that after April 25 until May 16, 1999, she telephoned the Respondent's referral number daily or every other day. She testified that additionally she went to the Respondent's offices on April 30, May 5, 7, 10, and 15 in an effort to speak with Taylor. According to Miron, she was told that Taylor was not available to see her on those dates. She did, however, speak with either Berry or Respondent's treasurer, Gary Schmidt. On each occasion she told them that she was available for referral and wanted to ask Taylor why she was not being referred to work.

On May 16, Taylor telephoned Miron to refer her to a job at the Hyatt hotel the following morning. It is uncontroverted that Taylor also told Miron that she should start looking for other employment. Miron questioned Taylor as to why he would tell her to look for other employment. Taylor said that she had been late for work at the *Les Miserables* move-out. Miron denied being late on that occasion. Taylor testified that he was told by the steward on the *Les Miserables* job, Al Price, that he had picked up the sign in list at 11:30 p.m. and placed a new list out at that time. Taylor testified that Miron and several others signed the latter list stating their starting time as 11:30 p.m.

On May 17, Miron reported to her assignment at the Hyatt hotel, but was then reassigned to work at the Boettcher concert hall where she worked for the day. Miron testified that after she completed work that day she telephoned the Respondent's referral number and recorded her availability for work. At 6 a.m. on May 18, Miron again telephoned the referral number and stated she was ready for referral. Miron did not receive a referral call that morning so she went to the Respondent's office at approximately 11:30 a.m. and talked to Berry about being assigned work. Berry referred Miron to a job that day at the Denver Convention Center where she was to serve as steward. Miron worked from about 12:30 to 11:30 p.m. Respondent's steward, Jim Clough then assigned Miron to work at the Red Rocks Amphitheater beginning at 8 a.m. on May 19. Miron worked at Red Rocks from 8 a.m. to 3 p.m., and again from 11 p.m. until 3 a.m. on May 20. Clough again called Miron later in the day on May 20, and referred her to work for 6 hours doing a load-out at the Convention Center.

After the May 20 Convention Center job Miron did not work again until June 8, 1999. She testified that in the interim she had telephoned and visited the hiring hall once or twice a week to report her availability for referral. On June 8, Respondent's steward, Lon Levine, telephoned Miron and told her that the head rigger for a Microsoft load-out had requested that she work with him for that day. Miron worked the Microsoft load-out job and then went to the Buell Theater to speak to Respondent's steward, Al Price. Price had been the steward responsible for the stagehand crew at the April *Les Miserables* assignment. Miron testified that she spoke to Price out of concern about Taylor's comment that she was late for that assignment. She inquired of Price if he had any problems with her work on that job. Miron testified that Price told her that he did not have a problem with her work and that she had shown up for the job on time.

On June 8, Miron received another letter signed by Taylor that stated, in part: "We have somehow misplaced your 1997 and 1996 W2s. We would appreciate it if you would make copies and send them to us. . . . As of now your status is 1st year. When we receive your W-2s, we will be happy to review your case again." Miron testified that she telephoned the Respondent's office and complained that she had previously submitted all of her W-2 forms and could not understand how the Respondent lost only 2 years out of all of the documents she had provided.

Miron testified that she continued to telephone the referral telephone number almost daily from June 8 to mid-July 1999, and also continued to visit the hiring hall at least once a week to seek work. Miron recalled telephoning the Respondent's office on July 14, and speaking to Berry. Miron stated that she wanted to talk to Taylor about the possibility of working the *Dave Matthews* concert that was scheduled to play in Denver. She had previously worked on that concert. Berry told Miron that she should continue to call the referral line. Miron was not assigned to work the Dave Matthews concert.

Miron states that she did as advised by Berry and after July 14, telephoned the referral number daily. Miron also recalled that during the latter part of July she went to the Respondent's office to attempt to speak to Taylor but he was not available. Miron telephoned Respondent's president, Dick Schadle, and expressed her concern that Taylor was not referring her for work. She asked Schadle to intervene on her behalf to rectify the situation. Schadle promised that he would discuss her concerns with Taylor. Within a couple of days Schadle and Miron spoke again and he told that he talked to Taylor. Schadle told Miron that the biggest problem was "people" not showing up for jobs on time or not staying for their entire shift. Schadle told Miron she needed to get in touch with Taylor in order to get the situation straightened out.

Miron continued telephoning the referral line and again visited the Respondent's offices on August 20 in an attempt to talk with Taylor. She was again unable to speak with Taylor, but did give Berry copies of her W-2 forms from 1994 through 1998. Miron left the Respondent's office and went to the Stout Street Bar. This bar is a gathering place for stagehands and has a telephone specifically reserved for Respondent to call stagehands for referrals. While Miron was at the bar the dedicated phone rang and Miron answered. Berry was calling and told Miron she was looking for 10 stagehands to work at the Denver Convention Center Ballroom. Miron told Berry that she was available. Berry replied that she could not refer her until Miron had spoken with Taylor.

Miron testified that after speaking with Berry she decided it was futile to continue seeking work from the Respondent and she stopped calling in for referrals. On August 20, Miron filed the instant unfair labor practice charge with the Board.

On October 25, 1999, the Denver Theatrical Stage Employees' Benefit Trusts sent Miron a letter advising her that the Trustees were interested in resolving any issues she had regarding the trusts. The letter further stated that they needed her assistance in the matter and asked that she submit to the trust her W-2 forms for calendar years 1995, 1996, and 1998.

Respondent's witness Donald Babeon, a production foreman for Brede Decorating Company, testified that he had worked with Miron and observed that she was tardy "several times." He finally became frustrated with Miron's tardiness and told Tay-

lor and the stewards that he would rather not have her referred on his calls because he needed people he could depend on. He placed the times that he counseled Miron for being late as having occurred in 1997 and 1998. Despite expressing his concerns about Miron, Babeon testified that she had been referred to his jobs after 1998. He could not recall if he had any problems with Miron's tardiness subsequent to that time. Gene Marquez, another stagehand, testified that he had worked with Miron and noticed that she was late "numerous times." Stagehand Dick Schadle testified similarly. Schadle occasionally would act as steward on jobs and on July 1, 1998, wrote a steward's report complaining of Miron's tardiness on numerous occasions on an assignment at the Colorado Convention Center.

In contrast to this testimony, Miron testified that she was never late for a referral with the exception of occasions when she was called for an assignment shortly before the work was to commence. I find that the record as whole shows that Miron did have some tardiness problems during the period she was referred to work by the Respondent.

Taylor testified that he was aware of the complaints about Miron's tardiness and considered that her record in this regard was "spotty at best." He was concerned that she seldom would call the hiring hall to report that she was going to be late for an assignment. It is in dispute as to whether Miron was late to the April 24 *Les Miserable* job. Miron testified that she was timely in reporting to work at 11:30 p.m. and the sign-in sheet supports this conclusion. Taylor testified that Steward Al Price reported to him that he picked up the sheet at 11:30 p.m. and placed a new out at that time. Miron had signed in on this later list. Miron credibly testified that she subsequently asked Price if she had been late and he replied no. Price did not testify at the hearing. I find that the Respondent failed to prove that Miron was indeed late for the *Les Miserables* job.

VI. ANALYSIS

A. Respondent's Referral Standards

The Government alleges that the Respondent operates its exclusive hiring hall without objective standards or criteria and thus violates Section 8(b)(1)(A) and (2) of the Act. The Respondent denies that its operation of the hiring hall in any way violates the Act's legal standards.

It is well established that "since a union has such comprehensive authority vested in it when it acts as the exclusive agent of users of a hiring hall and because the users must place such dependence on the union that there necessarily arises a fiduciary duty on the part of the union not to conduct itself in an arbitrary, invidious, or discriminatory manner when representing those who seek to be referred out for employment by it." *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898, 908 (1985). A union that operates an exclusive hiring hall must base its referrals on objective criteria. *Jacoby v. NLRB*, 233 F.3d 611, 615 (D.C. Cir. 2000), reversing and remanding *Plumbers Local 342 (Contra Costa Electric)*, 329 NLRB 688 (1999) ("a union commits an unfair labor practice if it administers the exclusive hall arbitrarily or without reference to objective criteria and thereby affects the employment status of those it is expected to represent"); *Stage Employees IATSE Local 592 (Saratoga Performing Arts Center)*, 266 NLRB 703, 709 (1983). The absence of written referral rules and standards is not a per se violation of the Act, but is a factor to be weighed in the analysis of whether a hiring hall is being operated according to objective criteria. *Stage Employees IATSE Local 592*, supra at fn. 2. Failing to provide information to hiring hall users of relevant rules, practices, standards, and procedures of a hiring hall is also a violation of the Act. *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109, 110 (1995).

Taylor subjectively determines who qualifies as a core employee based on his perception of who is attempting to make a full-time living as a stagehand. The Board has looked with disfavor on such a standard. *Plumbers Local 619 (Bechtel Corp.)*, 268 NLRB 766 ("the Board has found that a union's reliance on an applicant's financial need is a factor which supports a finding that a hiring hall has been unlawfully operated"). Under such a referral standard an employee whom Taylor subjectively considered as not trying to make a living as a stagehand would receive less consideration in receiving referrals. Taylor also relies on an employee's availability to make referral determinations. Again this is a subjective determination by Taylor. Although availability of employees who call the referral telephone number is recorded, Taylor testified that he did not require core employees to telephone in order to be referred. The Respondent does not make employees aware of how the hiring hall is operated and what criteria are used in making referrals. Employees are not informed of their core status or lack thereof. Likewise, they are not told of what efforts they can make to achieve the heightened status of a core employee.

Taylor makes similar subjective determinations as to experience, skills, and ability. The stagehands do not submit to the Respondent any documentation of what skills and experience they possess. Rather, Taylor assesses an employee's qualifications under these criteria by observation or word of mouth from others. The Board has ruled that a business agent's ability to exercise "unfettered discretion in making referrals" evidences a lack of objective criteria. *Plumbers Local 619*, supra.

In sum, the Respondent's hiring hall referral standards are based upon Taylor's subjective determination of whether a person is seeking to make a living as a stagehand and other assessments. His mental filtering of referral candidates involves the categorizing of individuals into a preferential "core" class that receives primacy in referrals. Based on the record as a whole I find that this ill-defined and subjective method of referring employees does not meet the Act's standards for objective criteria. I conclude, therefore, that the Respondent has violated its duty of fair representation and Section 8(b)(1)(A) and (2) of the Act by using such nonobjective referral criteria.

B. Miron's Referrals

The Government alleges that the Respondent unlawfully refused to refer Miron to employment. The Respondent denies that it ceased referring Miron for employment or unlawfully excluded her from employment. The Respondent argues that Miron did not receive referrals because she failed to notify the Respondent of her availability for work, was frequently not accessible when the Respondent attempted to contact her about

employment, and was not given as many assignments as others because of her tardiness record.[3]

The Respondent admits Miron was a qualified worker. As recently as May 18, 1999, she was even referred by Berry to the Denver Convention Center as steward, and in that capacity was responsible for the crew.

Miron credibly testified that she regularly reported her availability for work by telephoning the Respondent's dedicated referral number. Miron also testified without contradiction that she regularly went to the Respondent's office for the same purpose. While the Respondent's referral log shows that she telephoned less frequently than she claims, I find that Miron did, by a combination of her calls and visits, regularly make known to the Respondent that she was seeking work. The record also establishes that between 1993 and 1998 Miron regularly received referrals from the Respondent. Miron testified that during this period she was referred for work 3 to 5 days a week. The change in the referrals for Miron became most apparent to her following the April 24 *Les Miserables* job.

Taylor states he also had frequent problems contacting Miron when he wanted to refer her for work. He was not specific in this regard as to dates, jobs, and times. Miron denied that there were problems telephoning her. The record establishes that she consistently worked on referrals from 1993 until April 1999. I thus credit Miron and find that she was accessible had Taylor desired to contact her for referral.

The Respondent primarily asserts that Miron's tardiness was the reason she was not referred to work. Miron did have some tardiness problems. The record also establishes that tardiness was an ongoing problem among stagehands. Thus, I find the evidence does not show that Miron's tardiness record was unique. Taylor's testimony was vague as to specifics regarding Miron's tardiness. The one particular example he cited was the *Les Miserables* job of April 24. I have found that the evidence does not sustain the conclusion that Miron was late for that job. It is admitted that after that job, Taylor told Miron she should seek another line of work. Thereafter, Taylor personally only referred Miron to one other job despite her efforts for further work through the Respondent's exclusive hiring hall.

There was no showing that others were similarly denied employment referrals for lateness. This despite the acknowledgement by some of Respondent's witnesses that tardiness among stagehands "happened all the time."

Miron did get other work through the efforts of Berry and stewards after May 20. I find, however, that Taylor, Respondent's agent in charge of making hiring hall referrals, effectively stopped referring Miron after May 20, 1999.

In sum, I find that the Respondent has violated the Act by its diminished referrals of Miron. First, the Respondent's hiring hall rules are arbitrary and violate the Act. These subjective rules apply to all employees using the Respondent's exclusive hiring hall, including Miron. Secondly, the failure to refer Miron based on the discredited reasons assigned for those decisions are an additional reason that I find that she was unlawfully denied employment. I conclude that the Respondent's lack of referrals for Miron was not based upon an effort to efficiently operate the hiring hall. I further find that the arbitrary diminution of Miron's referrals commencing after May 20, 1999, is a violation of Section 8(b)(1)(A) and (2) of the Act. *Plumbers Local 198 (Stone & Webster)*, 319 NLRB 609, 612 (1995).

C. Miron's Pension Eligibility Documents

The Government's final allegation concerns the Respondent's alleged failure to forward Miron's W-2 forms to the appropriate trust fund. The Respondent argues that it was Miron who failed to submit the proper forms. In the alternative, the Respondent argues that since Miron was not eligible for a pension she has suffered no ill treatment by the W-2 forms not being transmitted to the trust.

Miron testified that she submitted her W-2 forms each year between 1994 and 1998 by personally delivering them to Respondent's office. Respondent's former president, David Clow, corroborated Miron to the extent that he acknowledged receiving some W-2 documents from her on one occasion.

Considering Miron's demeanor, her credible testimony that she was understandably desirous of establishing pension eligibility, and the corroborating testimony of Respondent's former president, I credit her testimony that she regularly submitted her W-2 forms to the Respondent.

The Respondent's concedes in its brief that it now has Miron's W-2 forms for all applicable years and pledges that if that information demonstrates she is qualified for a pension share, she will receive the proper credit under the pension trust.

At best the record establishes that the Respondent has handled Miron's pension documents in a haphazard way. It is suspicious that this conduct coincides with the arbitrary denial of referrals to Miron. On balance, however, I find that the Respondent handled her papers in a negligent manner. I find that this is insufficient grounds to be a violation of the Act, and that the Government has failed to prove that the Respondent unlawfully refused to transmit her pension documents to the trust.

CONCLUSIONS OF LAW

1. Freeman Decorating Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent, Denver Theatrical Stage Employees' Union No. 7 of the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(b)(1)(A) and (2) the Act.

4. The Respondent has not violated the Act except as herein specified.

[Recommended Order omitted from publication.]

[3] "Most important, while Local 7 admits that the charging party has not been referred as often as some others because of her extreme record of tardiness, Local 7 has never stopped referring her on that basis or any other basis." R. Br. p. 20.